Nos. 98-1701, 98-1706

In The

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,
v.
GARY LOCKE, Governor of Washington, et al.,
Respondents.

INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),
Petitioner,
v.
GARY LOCKE, Governor of Washington, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF ALASKA, CALIFORNIA, CONNECTICUT, FLORIDA, HAWAII, ILLINOIS, LOUISIANA, MAINE, MASSACHUSETTS, MISSISSIPPI, NEVADA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, UTAH, AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

BILL LOCKYER
Attorney General of the
State of California
RICHARD M. FRANK
Chief Assistant Attorney General
MARY E. HACKENBRACHT
J. MATTHEW RODRIQUEZ
Assistant Attorneys General
DENNIS M. EAGAN
Deputy Attorney General
Counsel of Record
MICHAEL W. NEVILLE
Deputy Attorney General
1515 Clay Street, Suite 2000
Oakland, California 94612-1413
Telephone: (510) 622-2113

BRUCE M. BOTELHO
Attorney General of the
State of Alaska

RICHARD BLUMENTHAL
Attorney General of the
State of Connecticut

ROBERT A. BUTTERWORTH
Attorney General of the
State of Florida

EARL I. ANZAI
Attorney General of the
State of Hawaii

(Additional counsel
listed on inside cover)

JAMES E. RYAN
Attorney General of the
State of Illinois

RICHARD P. IEYOUB
Attorney General of the
State of Louisiana

ANDREW KETTERER
Attorney General of the
State of Maine

THOMAS F. REILLY
Attorney General of the
Commonwealth of Massachusetts

MIKE MOORE
Attorney General of the
State of Mississippi

FRANKIE SUE DEL PAPA
Attorney General of the
State of Nevada

JOHN J. FARMER, JR.
Attorney General of the
State of New Jersey

ELIOT SPITZER
Attorney General of the
State of New York

MICHAEL F. EASLEY
Attorney General of the
State of North Carolina

MAYA B. KARA
Acting Attorney General
of the Commonwealth of the
Northern Mariana Islands

BETTY D. MONTGOMERY
Attorney General of the
State of Ohio

W.A. DREW EDMONDSON
Attorney General of the
State of Oklahoma

HARDY MYERS
Attorney General of the
State of Oregon

SHELDON WHITESTONE
Attorney General of the
State of Rhode Island

CHARLIE CONDON
Attorney General of the
State of South Carolina

JAN GRAHAM
Attorney General of the
State of Utah

Attorneys for Amici Curiae

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INTEREST OF THE AMICI CURIAE

Oil spills are "an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent." *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325, 328–29 (1973). Given the well-publicized history of oil spills in this country over the past 30 years, there is little need to recount here the grave harm that oil spills have caused to the natural resources and economic well-being of the States; it is a disturbing litany of dead birds, fish, and wildlife, oiled marshes, damaged commercial fisheries, and fouled beaches.

Because "sea-to-shore pollution [is] historically within the reach of the police power of the States," *id.*, at 343, the States, in response to the urging of their citizens, have responded to the oil spill threat. Initially, the reaction of many States to the increased oil tanker traffic in their waters and the consequent spills was the enactment of legislation providing for cleanup responsibility, liability in damages, civil penalties, and criminal fines. With the passage of time, however, as the number of spills mounted, the States have increasingly turned to prevention of oil spills as a surer way to avoid damages that oftentimes are exceedingly difficult to remediate.

California's experience is typical. The largest portion of crude oil arriving at California refineries comes by sea, resulting in heavy tanker traffic.[1] In January 1971, two tankships, the *Oregon Standard* and the *Arizona Standard*, collided in San Francisco Bay near the Golden Gate Bridge. Eight hundred thousand gallons of oil were spilled into the bay. Shortly thereafter, the California Legislature enacted section 293 of the California Harbors and Navigation Code, providing for strict liability for oil spills.[2] In October 1984, the outbound tankship *Puerto Rican* exploded and caught fire a few

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1. Currently, of the oil shipped to refineries in California, 50 percent—14.6 billion gallons per year—comes by tanker from Alaska or foreign sources.

2. 1971 Cal. Stat. ch. 1763, p. 3811, § 1.

miles outside the Golden Gate. The Coast Guard directed the crippled ship to a point south-by-southeast of the Farallon Islands, where it broke up, the stern sinking to the bottom. One and one-half million gallons of petroleum product were spilled within the Point Reyes-Farallon Islands National Marine Sanctuary. Little more than a year later, the tank barge *Apex Houston*, in transit from Martinez to Long Beach, spilled over 25,000 gallons of oil, killing or damaging 10,000 seabirds from San Francisco to Big Sur, including Marbled Murrelets, a threatened and endangered species. Following these two incidents, legislation was passed that widened the range of recoverable damages and costs for oil spills, and provided for the award of attorney's fees and expert costs to the prevailing plaintiff.[3]

In 1989, the *Exxon Valdez* tragedy occurred in Prince William Sound, Alaska. It was followed shortly by another major spill, again in California. In February 1990, the tank-ship *American Trader* grounded on its own anchor while attempting to moor at a marine terminal offshore Huntington Beach. The ship spilled 400,000 gallons of oil, causing extensive injury to fish and birds, damaging the local commercial fishing industry, and coating some 14 miles of beaches and shoreline with oil, resulting in the forced closure of local harbors and some of Southern California's finest beaches for as long as a month.

California's legislative reaction to these two spills was the passage of the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act of 1990.[4] For the first time, the California Legislature focused prominently on oil spill prevention, not just response and liability. To that end, the act required the adoption of regulations concerning various matters, including

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3. Cal. Harb. & Nav. Code § 294, 1986 Cal. Stat. ch. 1498, § 2.

4. 1990 Cal. Stat. ch. 1248, codified at Cal. Gov. Code §§ 8574.1-8574.10, 8670.1-8670.72, and Cal. Pub. Res. Code §§ 8750-8760.

tugboat escorts, marine terminals, and oil spill contingency plans for vessels and marine facilities; required the preparation and approval of operations manuals for marine terminals and facilities; required the inspection of vessels for "compliance with relevant federal law and the [act]"; required the inspection of marine facilities; implicitly recognized the exclusive role of the federal government in matters of vessel design and construction, including double hulls; and acknowledged the important role that the federal government plays in preventing and responding to oil spills, stating that "it is in the best interests of the state to coordinate with agencies of the federal government, including the Coast Guard, to the greatest degree possible."[5]

The subsequently enacted regulations have two aspects. First, they in large part incorporate federal spill prevention standards into state law, thereby bringing to bear an additional cadre of trained state inspectors to assist Coast Guard enforcement personnel, who are stretched thin. This cooperative inspection effort, which covers vessels and marine oil transfers, including bunkering and lightering, is memorialized in a Memorandum of Agreement signed by the Governor of California and the Commander of the Eleventh Coast Guard District. The agreement is implemented in a series of "cooperative agreements" between the Eleventh Coast Guard District, the California Office of Spill Prevention and Response, and the California State Lands Commission.

Second, the regulations either cover subject matter that is not provided for under Coast Guard regulations or supplement federal oil spill prevention standards in ways that do not conflict with those standards. An example is the state regulation that requires the maintenance of an underkeel clearance of at least six feet above the sea floor at all stages of an oil

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5. Cal. Gov. Code §§ 8670.2(l), 8670.17, 8670.17.2, 8670.18, 8670.22, 8670.28–8670.31; Cal. Pub. Res. Code §§ 8755, 8757, 8758.

transfer operation at an offshore marine terminal.[6] This regulation builds on California's experience with the Huntington Beach oil spill, where the *American Trader* punctured its hull by grounding on its own anchor during an attempted mooring at an offshore terminal. The Coast Guard's regulations do not include such a requirement.

Other States as well have adopted this twofold approach to oil spill prevention.[7] These programs employ a mutually beneficial form of cooperative federalism to work toward the common goal of both governments: preventing oil spills.

The sweeping field preemption that is argued for by petitioners would needlessly and uncritically foreclose the States from regulating in an area that implicates concerns at the heart of the States' police power. The proper analytical framework is that provided by conflict preemption, with its narrower, more discriminating assessment of state law to ascertain whether state law truly "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978).

SUMMARY OF ARGUMENT

1. The field preemption arguments advanced by petitioners are so broad that they call into question the legitimacy of state-federal programs for cooperative enforcement of federal regulations designed to prevent oil spills from tank vessels. Under these programs, certain States have incorporated federal

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6. 2 Cal. Code Regs. § 2390(g); 14 Cal. Code Regs. § 844.12.

7. E.g., Alaska Stat. § 46.04.060; 18 Alaska Admin. Code §§ 75.005–75.037, 75400(a)(2), 75.425(e)(2)–(4), 75.445(k), 75.480; Me. Rev. Stat. Ann. tit. 38, §§ 541, 543, 544, 546, 560; 06-096 Code Me. R. ch. 600, §§ 1, 3, 4, 8, 10 (amended eff. Nov. 7, 1999); Or. Rev. Stat. §§ 468B.340, 468B.345-375, 468B.390; Or. Admin. R. §§ 340-047-0100, 0120, 0150, 0170; R.I. Gen. Laws § 46-12.5.1-1 et seq., § 46-12.6-1 et seq.; Wash. Rev. Code §§ 88.46.030, .040, .050, .120, .160, .170; Wash. Admin. Code § 317-21-010 et seq., § 317-40-010 et seq.

regulatory standards into state law, then proceeded to enforce those regulations using state inspection personnel. These state inspectors provide a valuable adjunct to the limited inspection capability of the Coast Guard. If state regulation in these fields is foreclosed by federal preemption, that could be interpreted to mean that States are not free to adopt such standards, even though they are identical to the federal standards. Such a result would leave enforcement authority solely with the Coast Guard, thereby impairing the effectiveness of the enforcement effort. Federal preemption law requires no such anomalous result. See *California* v. *Zook*, 336 U.S. 725 (1949).

2. Prevention of oil pollution lies at the heart of the police power of the States. States have adopted regulations aimed at preventing oil spills, some of which either fill voids in the federal regulations, or otherwise supplement federal efforts to prevent oil spills from tank vessels. Absent a conflict with federal regulation, such state regulation is not preempted. The principles of conflict preemption, not implied field preemption, govern here. The presumption is against any implied preemption of state regulatory efforts in this area.

Concerning the challenged Washington regulations, most of the regulations merely impose operational requirements that can readily be complied with by tank vessels entering Washington waters, and the remaining regulations, while they may have some minimal extraterritorial effects, do not go so far as to impair any discernible purpose or objective of Congress.

ARGUMENT

I. PETITIONERS' PREEMPTION ARGUMENTS THREATEN THE VIABILITY OF JOINT STATE-FEDERAL PROGRAMS FOR THE ENFORCEMENT OF FEDERAL REGULATIONS

A. Federal Oil Spill Prevention Standards Have Been Incorporated Into State Law for Purposes of Insuring Effective Enforcement

A principal purpose of the oil spill prevention programs of many States is to strengthen compliance with federal oil spill prevention measures by bringing to bear the additional personnel necessary to effectively enforce the federal standards. In many cases, state spill prevention regulations incorporate federal standards by reference.[8]

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8. E.g., 14 Cal. Code Regs. § 818.02(c)(1)(A) (vessel contingency plans; methods to reduce spills during transfer and storage operations; "[a]ny information developed in compliance with Title 33 CFR, Parts 154 and 156 may be substituted for all or part of any comparable prevention measures required by this subsection"); *id.*, § 843.1(b)(1) ("persons in charge" of offshore oil transfer operations must meet requirements set forth in 33 C.F.R. § 155.710); *id.*, § 843.8 (deck lighting "required under 33 CFR 155.790" must be observed); *id.*, § 844.4(a)(3) (vessel to be lightered must have on board International Oil Pollution Prevention Certificate required by 33 C.F.R. § 151); *id.*, § 845.1 (transfer operators involved in bunkering and lightering shall comply with applicable law, including the provisions of 33 C.F.R. Parts 154, 155, and 156); 2 Cal. Code Regs. § 2340(b)(1) (vessel transfer operations at marine terminals shall be conducted in accordance with procedures required by 33 C.F.R. § 155.720); *id.*, § 2340(c)(18) (prior to transfer, emergency means of shutdown for vessel required by 33 C.F.R. § 155.780 must be in place); *id.*, § 2375(b)(4) (Vessel Person in Charge (VPIC) of U.S.-documented vessel must hold license and indorsement issued under 46 C.F.R. Parts 10 and 13); *id.*, § 2375(b)(6)(A), (B) (VPIC of foreign tank vessel must have papers issued by the flag state authorizing service as ship's officer and hold a "Dangerous-Cargo Endorsement or Certificate issued by a flag state party to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW), or other form of evidence

In California, the legislation further requires the state Administrator for Oil Spill Response to report to the Legislature concerning the adequacy of the Coast Guard's inspection program and to seek agreements with the Coast Guard to remedy any deficiencies. Cal. Gov. Code § 8670.18(c). An April 1992 report by the Administrator to the California Legislature identified shortcomings in the Coast Guard inspection program, concluding that the inadequacies were primarily due to a shortage of inspectors with adequate experience and training, and an over-reliance on the adequacy of overseas inspection of foreign-flagged tankers.[9]

Thereafter, on June 2, 1993, a Memorandum of Agreement

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attesting that the VPIC meets the requirements of Chapter V of STCW as a PIC of the transfer of oil or liquid cargo in bulk"); 06-096 Code Me. R. ch. 600, § 4(A) (33 C.F.R. Parts 95 and 164 regarding navigation safety), § 4(B) (transfer personnel procedure and records), § 10 (33 C.F.R. Part 16 regarding drug and alcohol testing) (amended eff. Nov. 7, 1999); Wash. Admin. Code § 317-40-010 et seq. (bunkering personnel and operations must comply with 33 C.F.R. Parts 155 and 156 and 46 C.F.R. Parts 12, 15, and 35).

9. The report drew many of its conclusions from reports of the federal government concerning the adequacy of the Coast Guard inspection program, primarily an October 1991 report of the General Accounting Office entitled, *COAST GUARD: Inspection Program Improvements Are Underway to Help Detect Unsafe Tankers*. The Administrator's report to the California Legislature summarized his conclusions as follows:

> "Coast Guard inspections have not always been reliable in detecting unsafe tankers. For tankers registered in the United States, such problems as too few inspectors, inexperienced inspectors, and limited inspection procedures have hampered the Coast Guard's inspection efforts. For foreign-flagged tankers, the Coast Guard relies heavily on inspections carried out under international agreements on behalf of the vessel's country of registration. However, these inspections have not always identified serious problems. Many reasons, including insufficient training for inspectors and efforts to reduce costs, may have limited the effectiveness of these inspections." Cal. Dept. of Fish & Game, Office of Oil Spill Prevention and Response, *Report to the Legislature: Evaluation of the Vessel Inspection Program of the United States Coast Guard* (April 1, 1992) 1.

was entered into by California's Governor and the Commander of the Eleventh Coast Guard District, providing for a cooperative program for oil spill prevention and response, including a joint vessel inspection program. As subsequently amended, the agreement provides, inter alia, that the parties will "cooperate and . . . coordinate their efforts in implementing and exercising their respective statutory and regulatory duties related to oil spill prevention and response"; consult with one another to "ensure state plans and policies for marine environmental protection are consistent with the [National Contingency Plan]"; cross-train "in each other's regulations and rules including the areas of inspection and response"; make their inspection records available to one another; promptly inform one another "of any situation or circumstance relative to a vessel whose condition or equipment may significantly increase the potential for an unauthorized discharge . . ."; "cooperatively examine pollution prevention and pollution response equipment aboard vessels and report noncompliance to the other party"; "cooperate to monitor transfer operations aboard tank vessels, including . . . dockside transfers . . . and lightering and bunkering operations"; schedule the monitoring of vessel transfer operations "to make best use of limited resources and avoid redundant oversight and disruptions to industry"; cooperate in the enforcement of requirements under the International Convention for the Prevention of Pollution From Ships, 1973, as modified by the Protocol of 1978 (MARPOL 73/78); and, regarding the inspection of oil transfers between tank vessels and marine facilities, "utilize the resources of both Parties efficiently and effectively," carrying out inspections both individually and jointly.

"Cooperative agreements" subsequently executed between the parties further implement the basic Memorandum of Agreement: in furtherance of a "vigorous inspection and enforcement campaign," state inspectors "will act as agents of the COTP [Coast Guard Captain of the Port]" when conducting annual and periodic inspections of marine oil transfer facilities (MOTF), including monitoring of oil transfers; all

violations noted by state inspectors "will be summarized and passed to the local MSO [Coast Guard Marine Safety Office] at the end of each month"; with one modification, the Coast Guard Marine Safety Offices "will accept the [State Lands Commission's] Marine Terminal Oil Pipeline test procedures as listed in Title 2, Article 5.5 of the California Code of Regulations as an alternative test procedure to Title 33, Code of Federal Regulations, Part (sic) 156.170(c)(4) and (f)(1–2)"; regarding identification of high-risk vessels arriving in California that present a significant oil spill threat, the parties will coordinate "joint boarding and possible enforcement action"; the State Lands Commission's Marine Facilities Division (MFD) field office "will accept the lead role for the review of MOTF Operations Manuals," and the Coast Guard Marine Safety Office "may accept MFD review of MOTF Operations Manuals in lieu of conducting its own review of these manuals"; the Coast Guard MSO and state MFD field offices "will provide their schedules for internal training to one another and will, to the maximum extent feasible, afford opportunities for the other agency to attend and participate"; and, to reduce the likelihood of oil spills from substandard vessels at marine terminals, the Coast Guard MSO will provide to the state MFD field office a daily listing of vessels targeted for boarding, and the State will monitor the transfer operations of such vessels, providing a report of deficiencies to the Coast Guard.

Based on these agreements, the State of California has been able to shoulder a substantial share of the burden for facility and vessel inspections, with the result that there is now in place a much more effective program than existed previously for the enforcement of federal regulations.[10]

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10. As a result of the Memorandum of Agreement and cooperative agreements, the Coast Guard seldom, if ever, monitors an oil transfer at one of California's 54 marine terminals. Overall, State Lands Commission inspectors monitor 50 percent of the marine terminal transfers, whether by barge or tankship, that take place in the state. Because the compliance level of local oil barges tends to be a known quantity, the percentage of

B. Petitioners' Preemption Arguments Are So Overbroad as to Foreclose State Participation in Such Joint State-Federal Programs

The argument of the International Association of Independent Tanker Owners (Intertanko) goes far beyond the discriminating approach to preemption adopted in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978). Intertanko argues for implied field preemption of all matters covered by chapter 37 of Title 46 of the United States Code. While vaguely conceding some shoreside role for the States in oil spill prevention, Intertanko argues that there is absolutely no role for the States when it comes to "on-board, primary conduct of tank vessels or their crews," Intertanko Merits Br., at 11, and that state regulations are in all events barred when they "directly coincide with on-board subject matters and legislative purposes of federal statutes governing vessel safety and marine environmental protection," *id.*, at 16. In this area, Intertanko concludes, the States are left with pilotage and recreational boating safety and registration as the sole areas in which the police power may operate. *Id.*, at 17.

The federal government's brief argues for the same ultimate conclusion. Before the court of appeals, the Government advanced a narrower, more restrained conflict preemption argument, but the argument that has emerged before this Court is one that, if accepted, would have far broader preemptive impact. The Government contends that the States are completely foreclosed from regulating any matters within the scope of 46 U.S.C. §§ 3701-3719, which is the present-day successor to Title II of the Ports and Waterways Safety Act of 1972 (PWSA), Pub. L. No. 92-340, 86 Stat. 427. U.S. Merits Br., at 15, 24-26. According to the Government's

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monitored oil transfers involving tankships is significantly higher, at 67 percent, than the overall monitoring rate. State inspectors monitor 100 percent of oil transfers at marine terminals by tankships that are first-time callers or problem vessels.

brief, the States were ousted from regulating tank vessel operations as far back as 1936, when Congress passed the Tank Vessel Act, Pub. L. No. 74-765, 49 Stat. 1889. U.S. Merits Br., at 22-23. As does Intertanko, the federal government concedes the States some role in regulation of port vessel traffic, which is covered by Title I of the PWSA, but only until the Coast Guard acts. *Id.*, at 15, 26-28.

As far as appears, these arguments would leave no role for the States in the areas assertedly preempted, even if that role were simply one of adopting federal regulations as state law and cooperating with the Coast Guard in a joint enforcement program of the type detailed above. Such cooperative enforcement efforts closely involve the States in enforcing federal standards regarding tank vessel equipment, maintenance, personnel qualifications, manning, and operations (see footnote 8, *supra*)—the very aspects of federal tank vessel regulation that petitioners say are off-limits to the States. This Court's precedents do not forestall such mutual state-federal cooperation.

II. THE PREEMPTION DOCTRINE DOES NOT PREVENT THE STATES FROM ADOPTING AS THEIR OWN THE CONTENT OF FEDERAL STATUTES OR REGULATIONS

States have frequently chosen to incorporate federal regulatory provisions into state law or to make violation of federal law the subject of state sanctions. See *California* v. *Zook*, 336 U.S. 725 (1949). Without more, such borrowing of federal law is not foreclosed by principles of federal preemption. *Id.*, at 730-735; *Asbell* v. *Kansas*, 209 U.S. 251, 257-58 (1908). Quoting from the Court's opinion in *Zook*:

> "The question is whether Congress intended to override State laws identical with its own when it, through the Interstate Commerce Commission, regulated share-expense passenger automobile transportation, or whether it intended to let State laws stand. While the statute says

> nothing expressly on this point and we are aided by no legislative history directly in point (footnote omitted), *we know that normally congressional purpose to displace local laws must be clearly manifested.*" (Italics added.) 336 U.S., at 733.

Of particular relevance to cooperative state-federal enforcement programs aimed at preventing oil spills is the Court's statement in *Zook* that, "[W]hen state enforcement mechanisms so helpful to federal officials are to be excluded, Congress may say so . . . ." *Id.*, at 732. And further: "It is difficult to believe that the I.C.C. intended to deprive itself of effective aid from local officers experienced in the kind of enforcement necessary to combat this evil . . . ." *Id.*, at 737.

It is similarly difficult to believe that preemption doctrine would require the Coast Guard to reject the type of state aid that it has welcomed in the Memorandum of Agreement and cooperative agreements outlined above. As *Zook* makes clear, the Supremacy Clause requires no such anomalous result.

III. IN THE EXERCISE OF THEIR POLICE POWER, THE STATES MAY REGULATE IN THE AREA OF OIL SPILL PREVENTION, PROVIDED ONLY THAT THEIR REGULATIONS DO NOT CONFLICT WITH THE OBJECTIVES OF CONGRESS

The overbroad preemption arguments made here also threaten the second area of state contribution toward the common goal of preventing oil spills—that involving state regulations that either cover subject matter that is not provided for under Coast Guard regulations or supplement federal oil spill prevention standards in ways that do not conflict with those standards.

The California regulations also offer examples of this type of state regulation. For instance, regarding several matters that are not covered by Coast Guard regulations, California

regulates oil transfer operations at offshore marine terminals,[11] onshore marine terminals,[12] and marine terminals generally.[13] California also supplements Coast Guard regulations in the areas of bunkering and lightering.[14]

These various regulations further, rather than conflict with, the congressional purpose of preventing oil spills. Moreover, all of them have a local focus; none implicate the concern with interstate and international uniformity that informed the

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11. E.g., 2 Cal. Code Regs. § 2390(g) and 14 Cal. Code Regs. § 844.12 (requiring a minimum underkeel clearance of six feet above the sea floor at all times during transfer operations at offshore marine terminals); 2 Cal. Code Regs. § 2390(b)(1) and 14 Cal. Code Regs. § 844.9 (requiring a tug or tugs to be standing by during mooring and unmooring operations); 2 Cal. Code Regs. § 2390(c)(2), (d)(2) and 14 Cal. Code Regs. § 844.9 (requiring presence of mooring master and assistant mooring master onboard tank vessel during mooring and unmooring).

12. E.g., 2 Cal. Code Regs. § 2330(b)(3)(C)(4) (requiring that a maximum transfer rate be established if any part of the transfer rate is to be by gravity flow); *id.*, § 2341(c) (requiring that each cargo hose string or vapor control hose used during transfer have either an insulating flange joint or a single length of non-conducting hose to ensure electrical discontinuity between the terminal and vessel).

13. E.g., 2 Cal. Code Regs. § 2330(b)(2) (requiring the persons in charge of the vessel (VPIC) and the terminal (TPIC) to hold a pre-transfer conference to insure a clear mutual understanding and agreement concerning applicable transfer information and procedures); *id.*, § 2340(b)(2) (requiring VPIC and TPIC, if previously agreed transfer procedures are to be changed, to stop transfer and agree on changes before they proceed); *id.*, § 2340(c)(28)(A), (B) (requiring vessel to have ability to move from berth within 30 minutes, either under own power or with tug assistance); *id.*, § 2340(c)(29)(A) (requiring vessel to be capable of rigging emergency tow wires forward and aft, with ends not greater than five feet above the water); *id.*, § 2380(d)(1)(B) (requiring a bolt in every hole when a bolted connection is used for transfer operations).

14. E.g., 14 Cal. Code Regs. §§ 844(a), 844.5(a) (providing that bunkering and lightering requirements are in addition to those at 33 C.F.R. Parts 155 and 156, which are incorporated by reference); *id.*, §§ 844(c), 844.5(c) (requiring boom deployment or capability to deploy boom during transfer; not required under Coast Guard regulations).

conclusion in *Ray* v. *Atlantic Richfield Co.*, *supra*, 435 U.S., at 163–64, that tanker design and construction standards necessarily must emanate solely from the federal government.

Despite the localized focus of such regulations and despite their lack of any extraterritorial impacts that would conflict with implicit congressional concerns with international uniformity, such as were identified in *Ray*, petitioners' preemption arguments would nonetheless foreclose such state regulation because the state rules relate to "on-board vessel operations." Nothing in the subject statutes or regulations warrants such a gross displacement of the police power of the States.

A. The Power to Prevent Oil Spills, Whether From Tank Vessels or Any Other Source, Is Within the Traditional Police Power of the States, and May Not Be Taken From the States Absent a Clear Expression of Intent by Congress

This Court has recognized that the prevention of oil pollution is at the core of the police power. In *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973), the Court rejected an argument that would have allowed federal admiralty jurisdiction to "swallow most of the police power of the States over oil spillage—an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent." *Id.*, at 328–29. The Court was acutely aware of the harmful impacts that oil spills can have on a State's recreational and natural resources and upon the livelihood of its citizens: "A State may have public beaches ruined by oil spills. Shrimp may be destroyed, clam, oyster, and scallop beds ruined and the livelihood of fishermen imperiled." *Id.*, at 332–33. Following a discussion of *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440 (1960) (approval of ship's boiler pursuant to federal vessel safety statute does not preclude enforcement of city ordinance against smoke pollution caused by boiler), the Court concluded: "It follows,

a fortiori, that sea-to-shore pollution—historically within the reach of the police power of the States—is not silently taken away from the States by the Admiralty Extension Act, which does not purport to supply the exclusive remedy." *Id.*, at 343.

The Court also observed in *Ray* v. *Atlantic Richfield Co.*, *supra*, that "enrolled and registered vessels must conform to reasonable, nondiscriminatory conservation and environmental protection measures imposed by a State (internal quotation marks omitted)," and that, "Of course, that a tanker is certified under federal law as a safe vessel insofar as its design and construction . . . does not mean that it is free to ignore otherwise valid state or federal rules or regulations that do not constitute design or construction specifications." 435 U.S., at 164, 168–69.

Further, the Court has been reluctant to conclude that, merely by implication, Congress has deprived the States of regulatory authority over core police power concerns, even in areas with a heavy federal regulatory presence: "When the State is seeking to protect a vital interest, we have always been slow to find that the inaction of Congress has shorn the State of the power which it would otherwise possess." *Kelly* v. *Washington*, 302 U.S. 1, 14 (1937) (federal regulation of motor-driven tugboat safety not so comprehensive as to exclude supplemental state safety regulations regarding same vessels); cf. *Askew*, *supra*, 411 U.S., at 343. To the same effect is *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597, 605 (1991): "When considering pre-emption, we must start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (Internal quotation marks omitted.) Accord, *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.").

Nor has it mattered that local police regulations have affected, even burdened, interstate and international seaborne com-

merce. For centuries, foreign vessels have complied with local regulations unique to each of the world's ports. Local pilotage requirements are a principal example. See *Cooley* v. *Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299, 319–20 (1851) (local pilotage requirement; no need for national uniformity). These requirements still obtain; for instance, an oil tanker of foreign registry approaching the Golden Gate, whether it be carrying crude oil from Indonesia or Venezuela or the Middle East, must still take on a local pilot. Nor are such local pilotage requirements dependent for their legitimacy on federal legislation. See *Cooley*, *supra*. Such local regulation is simply a fact of commercial life for vessels calling at ports around the globe.

B. State Oil Spill Prevention Measures That Do Not Conflict With Federal Law May Co-Exist With Federal Regulatory Standards

Conceptually, local pollution control measures regarding tank vessels are no different from the local pilotage requirements sustained in *Cooley*. Just as do local pilotage requirements, such local rules may co-exist with related regulations of the national government concerning "vessel operations," so long as they do not run contrary to a clearly discernable congressional intent to impose a uniform national rule and so long as they do not otherwise conflict with federal law. There is no sufficient basis in federal statutes or regulations for implying a congressional intent to preempt the field of "vessel operations."

The field preemption argued for by petitioners contrasts with the more careful and discriminating case-by-case analysis that this Court has traditionally employed when examining assertions that state exercise of the police power has been either preempted by federal regulation or displaced by the dormant Commerce Clause or the need for "uniformity" in admiralty law. State law "should be pre-empted . . . only to the extent necessary to protect the achievement of the aims of

the federal law, since the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted." (Internal quotation marks omitted.) *De Canas* v. *Bica*, 424 U.S. 351, 357, n. 5 (1976), quoting *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U.S. 117, 127 (1973).

Accordingly, a more sure-footed approach to the preemption issue presented here is to test each of the regulations against the following considerably narrower standard: does the state rule conflict with a federal statute or regulation? That is what this Court did in *Ray* v. *Atlantic Richfield Co.*, *supra*; it eschewed a field preemption analysis in favor of a particularized search for a true conflict between the state and federal regulations.

That was also the position of the United States before the Ninth Circuit in this case, where it advanced a narrow conflict preemption argument. U.S. Ninth Circuit Br., at 2–3, 21, 23, 34. Below, in explaining the application of conflict preemption to the regulations at hand, the federal government conceded that "exercises of state police power to prevent *tanker operations* from causing pollution are often not preempted (italics added)," and that several Washington rules "do not interfere in any way with federal statutory provisions," concluding that "we see no reason why they should be considered preempted." *Id.*, at 22, 54–55.[15]

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15. The concession below by the federal government concerning the Washington regulations that were not preempted reads as follows:

> **"4. Navigation and Engineering Practices**
>
> "By contrast, Washington Rules 317-21-205 and 317-21-210 raise no serious preemption issues.
>
> "Section 205 requires tank vessels in navigation in state waters to record positions every 15 minutes, to write a comprehensive voyage plan before entering state waters, and to make frequent compass checks while under way. See CR 106 Exh. 4(A), at 1–9 (*reprinted at* ER Tab 1). Section 210 mandates that tank vessels in state waters follow specified engineering and monitoring practices, such as that standby generators must be running and immediately available to

There is no assertion here by either petitioner that it is impossible to comply with both the Washington rules and the federal regulations. That leaves the alternative prong of conflict preemption: whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ray*, *supra*, 435 U.S., at 158, quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Accordingly, the inquiry should focus on two issues. First, is the state law inconsistent with a need for uniformity that is either obvious on its face or that has been clearly expressed by Congress? Second, does state law impair the accomplishment of congressional objectives? If the answer to both of these questions is no, then exercise of the State's police power is not foreclosed.

1. Considerations Regarding Uniformity

A concern with the practical need for uniformity regarding certain aspects of interstate and foreign commerce underlies much of the Court's jurisprudence concerning preemption, the Commerce Clause, and admiralty law. The Court has often focused on the extraterritorial impacts of a challenged state

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assume the electrical load for vessels not equipped with automatic standby switching gear. *Id.* at 1-17.

"In neither instance do these requirements go beyond international standards or conventions to which the U.S. is a party. They also do not interfere in any way with federal statutory provisions. Thus, we see no reason why they should be considered preempted. See also 61 Fed. Reg. 1052, 1080 (1996) (states may impose planning requirements for tank vessels so long as they do not preclude compliance with federal requirements).

". . . . . .

". . . [W]e believe that a remand is necessary so that the district court can consider the various Washington standards individually and determine how they relate to the existing federal and international schemes, using an appropriate preemption standard." U.S. Ninth Circuit Br., at 54-55.

regulation, as balanced against the strength of the police power concerns in which the state regulation is grounded, and has been particularly sensitive to the impracticalities engendered by state regulations that impose physical constraints on the operation of commerce that extend far beyond the borders of the State whose regulation is at issue. See, e.g., *Ray*, *supra*, 435 U.S., at 160–68 and n. 15 (preemption; state regulations prescribing standards for design and construction of tank vessels ruled invalid); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 772–75 (1945) (Commerce Clause; state statute limiting train lengths ruled invalid because of extraterritorial impacts on railroad operations in adjacent States); *Bibb* v. *Navajo Freight Lines*, 359 U.S. 520, 529–30 (1959) (Commerce Clause; Illinois statute requiring contoured mudflaps on trucks and banning mudflap design that was legal in 45 other States and affirmatively required in Arkansas held invalid); *South Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U.S. 177, 180–82, 196 (1938) (Commerce Clause; state statute prohibiting use of state highways by trucks exceeding prescribed width and weight limitations upheld).

Regarding preemption, "[i]n areas of the law not inherently requiring national uniformity (footnote omitted), . . . state statutes, otherwise valid, must be upheld unless there is found such actual conflict between the two schemes of regulation that both cannot stand in the same area, [or] evidence of a congressional design to preempt the field." (Internal quotation marks omitted.) *Head* v. *New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 430 (1963), quoting *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 141 (1963); cf. *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 373 (1959) (concern with uniformity in federal maritime law "still leaves the States a wide scope").

As applied to ships, state design and construction standards present the type of physical constraint on the conduct of interstate and foreign commerce that this Court has found must yield to the need for uniformity. *Ray*, *supra*; *Kelly* v. *Washington*, *supra*, 302 U.S., at 14–15 (1937). The problem

is that once a ship is constructed, it is simply impracticable to make structural alterations on a voyage-by-voyage basis to comply with differing or conflicting state design or construction standards.

Shipboard equipment, which tends not to be so inextricably integrated into a vessel's primary design and construction, presents a different issue, particularly regarding portable equipment, such as booming, which can be deployed during lightering operations to contain spills.[16] No issues concerning the legitimacy of state equipment requirements for tank vessels are presented here.[17]

Of the regulations that are now presented for review, many have absolutely no extraterritorial impact at all, and the few that arguably do have extraterritorial impact do not present the practical difficulties that rules concerning design and construction do. And, as the federal government conceded below (see footnote 15, *ante*), many of Washington's regulations, although they unquestionably relate to "vessel operations," are purely local in their application and have no extraterritorial impact at all. Some examples of these latter regulations are those requiring position recording, compass checks, pre-arrival systems testing, and preparation of voyage plans prior to entry into state waters. See Wash. Admin. Code § 317-21-205(1), (2), § 317-21-215.

2. Principles of Conflict Preemption

Once the uniformity issue is assessed, what remains is a

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16. States such as Alaska, California, and New Jersey, for instance, require booming during lightering. 18 Alaska Admin. Code § 75.025(b); 14 Cal. Code Regs. § 844.5(c); N.J. Admin. Code § 7:1E-2.7.

17. The court of appeals invalidated Washington's regulations insofar as they required tankers to be equipped with two separate radar systems, global positioning system receivers, and an emergency towing system. Because Washington chose not to seek review of this determination, there is no issue before the Court concerning state equipment requirements for tank vessels.

review for actual conflicts between state and federal regulations. Here, a number of well established principles apply. First, because the two governments are pursuing the common goal of preventing oil spills by regulating the same or related subject matter, one cannot argue that state oil pollution regulations run contrary to the overall "purposes and objectives of Congress." Nor does coincidence of objectives establish preemption. *California* v. *Zook*, *supra*, 336 U.S., at 730–35; *Florida Avocado Growers* v. *Paul*, *supra*, 373 U.S., at 142. Second, the States are free to fill in voids or gaps in federal regulations. *Kelly* v. *Washington, supra*, 302 U.S., at 10–11; *Reid* v. *Colorado*, 187 U.S. 137, 149, 150 (1902); *Savage* v. *Jones*, 225 U.S. 501, 531–33 (1912). Third, a *per se* case for federal preemption cannot be made simply by arguing, as does Intertanko, that the state rules "differ" or "diverge" from the federal regulations. Necessarily, when a State regulates in common with the federal government concerning a given subject matter, the regulation will differ, unless the regulation is identical. The salient question is whether the differences amount to a conflict. Fourth, there is no general bar to state regulations that supplement federal regulations, even if those regulations impose stricter standards. *Zook*, *supra* (state law imposed stricter criminal sanctions for same conduct). Fifth, the comprehensive scope of the federal regulations is not alone enough to establish preemption. *New York Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 415 (1973). Finally, "[i]n . . . areas of coincident federal and state regulation, the teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists." (Internal quotation marks omitted.) *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 130 (1978).

State oil spill regulations should be tested using the foregoing principles of conflict preemption, not the broad categorical approach of field preemption, which precludes the States from supplementing federal regulations in ways that could help achieve the common goal of oil spill prevention.

C. In Enacting 46 U.S.C. §§ 3701–3719, Congress Did Not Implicitly Intend to Foreclose the States From Regulating Tank Vessel Operations to Prevent Oil Spill Pollution

Petitioners base their field preemption argument principally on two grounds: that the text of the Ports and Waterways Safety Act and the subsequent manner of its codification evidence a congressional intent to preempt state regulation of most aspects of tank vessel regulation, including vessel "operations," and that the need for uniformity implicit in certain international conventions concerning vessel safety and marine pollution by vessels entirely prevents the States from regulating in these areas. Neither basis for the preemption argument is supportable.

Both petitioners place great weight on the "may"–"shall" difference in the authorizations to the Secretary to adopt regulations in Titles I and II, respectively, of the Ports and Waterways Safety Act. The relevant language is now contained in 33 U.S.C. § 1223 and 46 U.S.C. § 3703, respectively. The argument is that when Congress used the word "shall" regarding the issuance of regulations on matters covered in Title II, that evidenced congressional intent to oust the States from regulating regarding any of those matters. Intertanko Merits Br., at 21–25; U.S. Merits Br., at 24–26. Such a sweeping preemption by Congress of state regulatory authority cannot reliably be inferred from such a thin textual basis. The words may reflect nothing more than a congressional judgment about the relative necessity of regulations in the respective areas covered. The words reveal nothing at all about the intent of Congress concerning preemption of state power to regulate in these same fields.

Likewise, petitioners' focus on the Secretary's power (delegated to the Coast Guard) to issue regulations on various matters, including the "operation" of vessels, 46 U.S.C. § 3703, isn't persuasive. 33 U.S.C. § 1223, involving the "permissive" regulatory authority of the Coast Guard, and to

which petitioners ascribe quite different preemptive effects, see U.S. Merits Br., at 26-28; Intertanko Merits Br., at 22-23, also empowers the Coast Guard to regulate vessel "operation" and the "operating" requirements, conditions, characteristics, and capabilities of vessels. 33 U.S.C. § 1223(a)(1), (a)(4)(C), (D). Section 1223, no less than 46 U.S.C. § 3703, provides for regulation of the "on-board vessel operational procedures" that Intertanko says are completely off-limits to the States. Intertanko Merits Br., at 40. There is thus textual spillover between the provisions of the two codes, destroying any artificial attempt to mutually seal off their respective subject matters for purposes of furthering a preemption argument.

Nor, finally, is there a basis in certain international conventions for concluding that Congress intended to preempt the States from regulating tank vessel operations to prevent oil spill pollution. The argument that international marine commerce requires certain uniform standards to function effectively makes sense regarding certain regulatory requirements, such as those pertaining to vessel design and construction, which can have profound extraterritorial impacts. The argument has little persuasive force, however, regarding state-imposed operational requirements that tank vessels can readily comply with. See the discussion of uniformity under heading III.B.1 above. Further, Congress has clearly determined that any preference for uniformity has limits. See 46 U.S.C. § 3703(a) (providing that the Secretary "may prescribe regulations [for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels] that exceed standards set internationally"). Moreover, diversity is reflected in the varying local requirements for pilotage, and in the varying state requirements regarding the level of financial responsibility that must be established by U.S. and foreign-flagged tank vessels, which is sanctioned by section 1018 of the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484, 33 U.S.C. § 2701 et seq. The broad uniformity referred to by petitioners does not

exist, nor, in most instances, is it necessary.

CONCLUSION

For the foregoing reasons, the *amici* States respectfully request that the decision of the court of appeals be affirmed.

Respectfully submitted,

BILL LOCKYER
Attorney General of the
State of California
RICHARD M. FRANK
Chief Assistant Attorney General
MARY E. HACKENBRACHT
J. MATTHEW RODRIQUEZ
Assistant Attorneys General
DENNIS M. EAGAN
Deputy Attorney General
Counsel of Record
MICHAEL W. NEVILLE
Deputy Attorney General
1515 Clay Street, Suite 2000
Oakland, California 94612-1413
Telephone: (510) 622-2113

BRUCE M. BOTELHO
Attorney General of the
State of Alaska

RICHARD BLUMENTHAL
Attorney General of the
State of Connecticut

ROBERT A. BUTTERWORTH
Attorney General of the
State of Florida

EARL I. ANZAI
Attorney General of the
State of Hawaii

(Additional counsel
listed on next page)

November 1999

JAMES E. RYAN
Attorney General of the
State of Illinois

RICHARD P. IEYOUB
Attorney General of the
State of Louisiana

ANDREW KETTERER
Attorney General of the
State of Maine

THOMAS F. REILLY
Attorney General of the
Commonwealth of Massachusetts

MIKE MOORE
Attorney General of the
State of Mississippi

FRANKIE SUE DEL PAPA
Attorney General of the
State of Nevada

JOHN J. FARMER, JR.
Attorney General of the
State of New Jersey

ELIOT SPITZER
Attorney General of the
State of New York

MICHAEL F. EASLEY
Attorney General of the
State of North Carolina

MAYA B. KARA
Acting Attorney General
of the Commonwealth of the
Northern Mariana Islands

BETTY D. MONTGOMERY
Attorney General of the
State of Ohio

W.A. DREW EDMONDSON
Attorney General of the
State of Oklahoma

HARDY MYERS
Attorney General of the
State of Oregon

SHELDON WHITESTONE
Attorney General of the
State of Rhode Island

CHARLIE CONDON
Attorney General of the
State of South Carolina

JAN GRAHAM
Attorney General of the
State of Utah

Attorneys for Amici Curiae